STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL E. HALL,

Plaintiff,

v

W3 CONSTRUCTION COMPANY,

Defendant/Third-party Plaintiff/Appellee,

and

GREAT LAKES CEILING AND CARPENTRY, INC.,

Third-party Defendant/Appellant.

UNPUBLISHED
August 23, 2002

No. 233337
Wayne Circuit Court
LC No. 98-828396-NO

Before: Zahra, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Appellant Great Lakes Ceiling and Carpentry, Inc. appeals as of right from the trial court's opinion and order, following a bench trial, which entered judgment in favor of appellee W3 Construction Company in this indemnity action. We affirm in part and reverse in part.

Michael Hall is an employee of Great Lakes, which was a subcontractor at a work site where W3 Construction was the general contractor. Hall was injured while working on July 31, 1997. At his deposition, Hall testified that the superintendent, an employee of W3 Construction, instructed Hall to place some lumber on scaffolding on which Hall was working. In the process of rolling the scaffolding to another area, the lumber fell off the scaffolding and hit Hall in the back.

In September 1998, Hall filed suit against W3 Construction, alleging that it was negligent by failing to adequately supervise the site and that it failed to ensure that the site was reasonably safe. In December 1998, W3 Construction filed a third-party complaint against Great Lakes for contractual and common-law indemnity. The parties had entered into a contract that included an indemnity provision. The parties subsequently settled Hall's claim, and both W3 Construction and Great Lakes contributed toward the settlement in January 2000.

The parties on appeal proceeded to a bench trial that was conducted in April 2000.[1] The trial court issued its opinion and order on February 28, 2001. The trial court ruled that the indemnity provision did not violate MCL 691.991.[2] The trial court further found that even if the indemnity provision did not cover W3 Construction for its own negligence, it was still entitled to indemnity because Hall was one hundred percent responsible for the accident. Lastly, the trial court found that W3 Construction was entitled to attorney fees and costs under the broad language of the indemnity provision.

On appeal, Great Lakes argues that the trial court erred in ruling that it was liable to indemnify W3 Construction. Great Lakes contends that the express language of the indemnity provision does not require Great Lakes to indemnify W3 Construction for its own negligence, that the indemnity provision violates MCL 691.991 and is therefore unenforceable, that the trial court's factual finding that Hall was solely responsible for the accident is clearly erroneous, and that W3 Construction is not entitled to attorney fees and costs under the terms of the indemnity provision.

The indemnity provision at issue states:

> The Subcontractor shall indemnify and save harmless **W-3 CONSTRUCTION CO.** and its employees or agents from and against all losses and claims, demands, payments, suits, actions, recoveries and judgements of every nature and description brought or recovered against **W-3 CONSTRUCTION CO.** by reason of any act or omission of the said Subcontractor, his agents or employees in the execution of the work or in the guarding of it.

Indemnity contracts are construed in the same manner as are contracts in general. *Hubbell, Roth & Clark, Inc v Jay Dee Contractors, Inc,* 249 Mich App 288, 291; 642 NW2d 700 (2002). When the terms of the indemnity contract are unambiguous, construction of the contract is for the court to determine as a matter of law. *Id.* The "cardinal rule" in interpreting a contract is to ascertain the intent of the parties, which is to be accomplished by reference to the contractual language alone. *Id.*

We affirm the trial court's ruling that W3 Construction is entitled to indemnity for the reason that Hall was solely responsible for his injury.[3] Contrary to Great Lakes' argument, there

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[1] The trial consisted of reading the deposition transcripts of Michael Hall, Randal Armour (the superintendent employed by W3 Construction), William Premo (the project manager employed by W3 Construction), and Ronald Halasz (a shareholder and secretary/treasurer of Great Lakes).

[2] MCL 691.991 provides that it is against public policy for a party to a construction contract to require another party to indemnify it for the sole negligence of the indemnitee, and, thus, any such provision is void and unenforceable.

[3] It is not necessary to address whether the indemnity provision covers W3 Construction for its own negligence because the provision, by its terms, provides indemnification where the action arises out of the acts or omissions of the subcontractor's employee. Because the provision does not attempt to indemnify W3 Construction for its sole negligence, it does not violate MCL 691.991.

is evidence to support the trial court's decision and it is, therefore, not clearly erroneous. Hall testified at his deposition that he was aware of the risk of pushing scaffolding that had lumber placed on it. Hall also testified that he was pushing the scaffolding, knew that there was a depression into which he was pushing the scaffolding, and knew that pushing the scaffolding into a depression would cause it to shake back and forth. Hall stated that although he had C clamps, it did not occur to him to use the C clamps to secure the lumber when moving the scaffolding. Because the trial court's view of the evidence is entirely plausible in light of the record viewed in its entirety, the trial court's decision that Hall was solely responsible for his injury is not clearly erroneous. *Beason v Beason*, 435 Mich 791, 803; 460 NW2d 207 (1990).

Here, the indemnity provision states that the subcontractor shall indemnify W3 Construction for claims brought against it "by reason of any act or omission of the said Subcontractor, his agents or employees", and Hall is an employee of the subcontractor. Consequently, the trial court did not err in ruling that W3 Construction was entitled to indemnity because the underlying action involved an act of Great Lakes' employee, who was found to be solely responsible for the accident.

The trial court also awarded attorney fees and costs in the amount of $27,520.90 under the language requiring the subcontractor to indemnify W3 Construction "against all losses and claims, demands, payments, suits, actions, recoveries and judgements of every nature and description." Generally, attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or where provided by contract of the parties. *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999); *McAuley v General Motors Corp*, 457 Mich 513, 519, n 7; 578 NW2d 282 (1998); *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 474; 521 NW2d 831 (1994).

The parties rely on the terms of the indemnity provision. In *Redfern v R E Dailey & Co*, 146 Mich App 8, 19; 379 NW2d 451 (1985), relied upon by the trial court for its award of attorney fees and costs, this Court held that attorney fees were recoverable under language stating "expenses of every character whatsoever." Conversely, in *Beaudin v Michigan Bell Telephone Co*, 157 Mich App 185, 189; 403 NW2d 76 (1986), this Court held that the language in the indemnity provision did not expressly allow indemnification for attorney fees, costs, or any other expense. In the present case, the indemnity provision applies to "all losses and claims, demands, payments, suits, actions, recoveries and judgements of every nature and description", but does not include any language including attorney fees, costs, or other expenses. Therefore, we conclude that the trial court erred in awarding attorney fees and costs under the indemnity provision because the provision does not expressly provide for such a recovery. The award of attorney fees and costs in favor of W3 Construction is accordingly reversed.

Affirmed in part and reversed in part. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Brian K. Zahra
/s/ Harold Hood
/s/ Kathleen Jansen